REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARSEN
CIVIL APPEAL NO. E017 OF 2024

SANLAM GENERAL INSURANCE CO.LTD...APPELLANT/APPLICANT

VERSUS

DOFA ABDI BARROW.....1ST RESPONDENT

GEDI MOHAMED KANYERE.....2ND RESPONDENT

(Being an appeal from the ruling of Hon. Edward Too, SPM, in Hola, SPM`s Court Civil Case No. E046 of 2024 delivered on 31/102024)

JUDGMENT

1. The trial court struck out the Appellant`s defence on the ground that the same did not raise triable issue consequent to which the court entered judgment for the Respondents in the sum of Ksh. Ksh.268,755/=. The Appellant was aggrieved by the decision and lodged the instant appeal on the grounds that:
    1. That the learned trial senior principal magistrate erred in law and in fact by holding that the appellant's filed defence raises no triable issue yet the said defence raised triable issues which were weighty.
    2. The learned trial senior principal magistrate erred in law and in fact by striking out the defence of the appellant which had triable issues.
    3. The learned trial senior principal magistrate erred in law and in facts by holding the appellant partially settled the decretal sum yet the whole decretal sum

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Kshs 540,414/= was settled as evidenced by the remittance receipts produced before the trial court.

4. The learned trial senior principal magistrate erred in law and in fact in entering judgment for Kshs 271,659/= forcing the appellant to pay double the sum the appellant was to pay.

2. The case for the Respondents was that they obtained judgments against the Appellant`s insured in Hola Principal Magistrate`s Court Civil Suit Nos. 17 of 2021 and 18 of 2021 all to the total sum of Ksh.540,414/= being compensation for injuries sustained in a road traffic accident in a vehicle insured by the Appellant. That of the decretal sum, the Appellant paid Ksh.271,659/= and failed to pay the balance of Ksh.268,755/=. The Respondents filed a declaratory suit against the Appellant claiming the unpaid balance.
3. The Appellants entered a defence in the declaratory suit dated 12th September 2024 in which they contended that no demand letter or notice to sue was served on them and further contended that they had settled the whole of the decretal sum of Ksh.524,180/= before the suit was filed.
4. The Respondents thereupon filed an application dated 20th September 2024 seeking to have the defence struck out for being an abuse of the process of the court and for judgment to be entered for the Respondents.
5. The trial court in a ruling delivered on 30th October 2024 struck out the defence and entered judgment for the

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Respondents in the sum stated above which action provoked the instant appeal.

6. The appeal was canvassed by way of written submissions. The Appellant submitted that they stated in their defence that the decretal sum had been settled and they annexed proof of payment through remittance receipts. They submitted that the trial court ought to have allowed the suit to go for trial as the principle of striking out suits is that a defence should only be struck out in the clearest of the cases. The Appellant relied on the words of Madan JA in **D.T. Dobbie & Company (Kenya) Ltd v Joseph Mbaria Muchina & another (Civil Appeal 37 of 1978 (1980)** eKLR where the learned judge held that:

> **"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."**

7. It was submitted that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and that even if the case is weak, the court ought to have allowed the same to go for trial. That the defence in their

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case was not frivolous. That it raised triable issues and disclosed a genuine issue of the full settlement of the decretal sum.

8. The Appellant submitted that the trial court failed to consider the annexed evidence on payment of the decretal sum of Ksh.540,414/=. They cited the case of **Trust Bank Ltd v Amalo Company Ltd (2002) eKLR** where it was emphasized that:

> **Where a defence raises any triable issue, including those based on documentary evidence, the matter must go to full trial.**

9. It was submitted that the trial court failed to appreciate the documentary evidence presented by the Appellant confirming full payment of the judgment debt thus leading to miscarriage of justice as the Appellant was ordered to pay twice of the same debt. The Appellants urged the court to allow the appeal.

10. Respondents on the other hand submitted that the Appellant has paid part of the decretal sum of Ksh.271,569/=. They cited the case of **Anita Mwende Analo v Invesco Insurance CO. ltd,** HCCA No.7 of 2015, where it was held that:

> **24. It is not in dispute that the respondent paid throw away costs of Shs.12,000/= through cheque No. 000345 in favour of the defendant in CMCC No.247 of 2013. It also paid for the cost of the 2nd medical report in favour of the plaintiff. The respondent could not have spent**

its resources to meet these expenses if the 1st defendant in CMCC No. 247 of 2013 was not insured by the company….

26. In the defence, the respondent admits that it had made an offer to settle the matter in favour of the plaintiff by installments. It is highly probable that such an offer could only be only be made by a party who had quietly admitted liability. The respondent was not in a philanthropic mission to dish out its resources to parties who were not its clients and in cases which did not concern it.

11. It was submitted that the Appellant having settled the decretal sum there cannot be a valid defence as the same is proof of admission of liability. They further made reliance on the of **Matthew Adams Karauri v Zablon Mathenge Itewa (20180 eKLR** where the court struck out the defendant`s defence on ground that the defendant had made part payment hence to refer the matter to full trial would be injustice to the Applicant.

The Respondents urged the court to dismiss the appeal.

Analysis and determination

12. It is the duty of this court, as the first appellate court in the matter, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand

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- see the Court of Appeal case of **Gitobu Imanyara & 2 Others –vs- Attorney General** [**2016] eKLR**. The same court in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, stated as follows on the issue:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.**

13. I have carefully considered the pleadings and submissions filed herein. The issue for determination in this appeal is whether the trial court was in error in striking out the Appellant`s defence.

14. The power of the trial court to strike out pleadings is stipulated under Order 2 Rule 15(1) of the Civil Procedure Rules which provides as follows:

> **(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
>
> **a) It discloses no reasonable cause of action or defence in law; or**
>
> **b) It is scandalous, frivolous or vexatious; or**

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c) **It may prejudice, embarrass or delay the fair trial of the action; or**

d) **It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

15. It however has to be noted that the power to strike out pleadings is a discretionary power of the trial court. It is trite that an appellate court's interference with the exercise of judicial discretion is limited and for this Court to interfere, it must be satisfied either that the trial court misdirected itself in some matter hence arrived at a wrong decision or that it is manifest from the case as a whole that the magistrate was clearly wrong in the exercise of its discretion and that as a result there has hindered access to justice. In **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** where it was stated:

> **"Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93."**

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16. The principles applicable in striking out suits are settled. In the case of **D.T. Dobie & Company (Kenya) Ltd. –vs- Joseph Mbaria Muchina (1982) KLR 1** Madan J.A stated as follows:

> **"…No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it..."**

In the same case the court stated that-;

> **"The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."**

17. The Court of Appeal in the case of **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu**

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[2009] eKLR established that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. Care should also be taken that a litigant is not precluded from accessing justice. In the case of **Crescent Construction Co. Ltd Vs Delphis Bank Ltd (2007) eKLR** the same court stated thus: -

> **"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."**

18. A Respondent in an application for striking out a defence must establish that the defence raises a triable issue. In the case of **Trikam Maganlal Gohil & another vs. John Waweru Wamai (1983) eKLR** it was held that:

> **The Respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise. Order XXXV rule 2. So, if the Applicant has set out in his affidavit(s) in**

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support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgment the Respondent must discharge the onus on him of showing his defence(s) raises triable or bona fide issues. They will be ones of law or fact. If they are of fact, then, bare denials by the Respondent or his Advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule that those issues are raised.

19. A triable issue is one that requires further interrogation by the court and ought to be ventilated in a full trial. In **Kenya Trade Combine Ltd v N M Shah [2001] eKLR,** it was stated that:

> **"In a matter of this nature, all that a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."**

In **Olympic Escort International Co. Ltd. & 2 Others v. Parminder Singh Sandhu &Another [2009] eKLR (Civil Appeal 306 of 2002)** it was held that:

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“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”

In **Giciem Construction Company v Amalgamated Trade Services LLR No. 103 (CAK)** the Court of Appeal stated that:

“As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”

20. The appeal in this matter is based on the ground that the trial court erred in failing to consider the evidence on payment presented by the Appellant. The trial magistrate in his ruling never mentioned anything on the documentary evidence presented by the Appellant that the decretal sum was paid in full. The only comment the court made is that the Appellant made part payment of Ksh.271,659/= and therefore that there was no trial issue disclosed in the case. A keen look at the pleadings shows that there was no dispute on the part payment. The dispute was whether the decretal sum was paid in full.

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21. Similarly, the submissions by counsel for the Respondents were based on part payment of Ksh.271,659/= and no comment was made on the contention by the Appellant that the decretal sum was made in full. Neither did counsel say anything on the remittance receipts presented by the Appellant.

22. I have considered the principles stated above that guide the courts in striking out suits. In my view the defence raised by the Appellant was not a clear-cut case for striking out. I find that a bona fide triable issue was established in the defence that the decretal sum was paid in full. Documents were produced purporting to be for full settlement. This was an issue that warranted further interrogation by the court and could only be ventilated in a full trial failure to which it would amount to condemning the Appellant unheard. It is during the hearing that the Appellant would demonstrate that the decretal amount was paid to the Respondents. Failure by the learned magistrate to consider the averment on full payment was a misdirection on his part as a result which he arrived at a wrong decision. Otherwise, no evidence was laid out to the court that the defence was an abuse of the process of the court.

23. The upshot is that I find that the trial court erred in holding that the Appellant`s defence did not raise a triable issue and as a result was wrong in striking out the defence. In view of the foregoing, I am inclined to allow the appeal which I hereby do and order as follows:

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a) **The Notice of Motion by the Respondent/Plaintiff in Hola MCCC/E046 of 2024 dated 20th September 2024 is dismissed and the ruling thereof dated 30th October 2024 and all subsequent orders thereto are set aside.**
b) **That this court makes an order for the trial to go to full hearing.**
c) **The suit is remitted back to Hola magistrate`s court for hearing and determination on merit by a magistrate of competent jurisdiction other than Hon. Edward Too.**
d) **The Appellant to have the costs of the appeal.**

Delivered, dated and signed at GARSEN this 30th April 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Lokol for Appellant

Miss Nkocho for 1st Respondent

Court Assistant – Mwero

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